

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-1107

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

v. :

GUSTAVO PASSARELLI, :

Defendant-Appellant. :

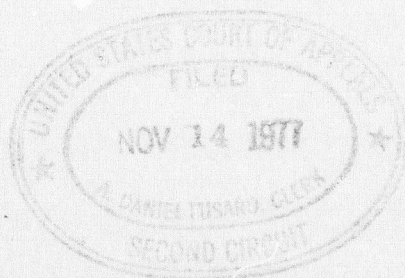
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DOCKET NO. 77-1107

PETITION FOR REHEARING AND
DETERMINATION EN BANC

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The Appellant, GUSTAVO PASSARELLI, respectfully petitions this Court to grant a rehearing en banc with respect to its decision of October 20, 1977, which affirmed his conviction and judgment of the District Court of having conspired to violate Title 18 United States Code Section 656 and Title 18 United States Code, Section 1014, in violation of Title 18, United States Code, Section 371 and of having violated Title 18 United States Code, Section 1014.

STATEMENT OF FACTS

The Appellant, Gustavo Passarelli, was charged along with the defendants, William H. Cleary and Jermone S. Healy in twelve counts of a 16 count indictment with having conspired with each other to violate Title 18 United States Code, Section 656 and Title 18 United States Code, Section 1014 in violation of Title 18, United States Code, Section 371 and with substantive violations thereof. Count 1 of the indictment is the conspiracy count; Counts 2 through 8, inclusive of the indictment allege substantive violations of Title 18 United States Code, Section 656; Counts 9 through 12, inclusive of the indictment allege substantive violations of Title 18 United States Code, Section 1014. The Appellant was also charged in Counts 2 through 12, inclusive of the indictment with the crime of aiding and abetting.

In substance, the indictment alleges that the Appellant,

Gustavo Passarelli and the defendant, Jerome Healy conspired together and with the defendant William H. Cleary, an Asst. Manager of the Barclays Bank of New York, a bank the deposits of which were insured by the Federal Deposit Insurance Corporation, to misapply the moneys, funds and credit of said bank and to make false statements of material facts upon applications for loans and financial statements for the purpose of influencing the action of said bank.

The Appellant Gustavo Passarelli was charged in Counts 2 through 8 inclusive of the indictment with aiding and abetting the defendant William H. Cleary with misapplication of bank funds with regard to seven \$5,000.00 loans made by the defendant William H. Cleary on behalf of the Barclays Bank of New York. The Appellant was also charged in Counts 9 through 12 inclusive of the indictment with making false statements of material facts upon applications and financial statements with regard to four loans made by the Barclays Bank of New York.

Prior to trial the defendant Jermon F. Healy pleaded guilty. He testified as a government witness during the trial. The Appellant Gustavo Passarelli and the defendant William H. Cleary were tried together.

The jury returned a verdict of guilty against the Appellant as to Count 1,3,4,5,7,8,10 and 12 of the indictment. Count 1

of the indictment is the conspiracy count. Counts 3,4,5,7, and 8 allege violations by Appellant as an aider and abetter of Title 18, United States Code, Section 656. Counts 10 and 12 of the indictment allege violations of Title 18, United States Code, Section 1014.

The defendant William H. Cleary, who was an officer of the Barclays Bank of New York was found not guilty on Counts 3,4 and 5 of the indictment. On motion by the Appellant, his convictions on said three counts were reversed as the Appellant could not as a matter of law be guilty as an aider and abetter if the principal who was the bank officer was found not guilty.

In substance the indictment alleges that the Appellant PASSARELLI and the defendants JERMONE S. HEALY and WILLIAM H. CLEARY conspired to violate Title 18, United States Code, Sections 656 and 1014 and that in fact the defendants did violate said Federal Statutes.

The Appellant appealed his convictions on Counts 7,8,10 and 12 of the indictment. This Court reversed the Appellant's conviction as to Counts 7 and 8 of the indictment and affirmed as to Counts 10 and 12 of the indictment.

Count 10 of the indictment alleges that the Appellant made a

materially false statement on October 22, 1975 with regard to a \$5,000 loan made that date and that the name of the borrower on the loan application or financial statement was Carmine Liberatore.

Count 12 of the indictment alleges that the Appellant made a materially false statement on November 25, 1975 with regard to a \$5,000 loan made that date and that the name of the borrower on the loan application or financial statement was Thomas Powers.

On appeal to the United States Court of Appeals the Appellant contended that the District Court erred in refusing his requested instruction on "materiality". The requested instruction reads as follows:

"Materiality"

In order to determine whether any statement is false as to a material matter, you must decide whether the statement was false and whether the statement had a natural tendency to influence or was capable of influencing the decision of the person or institution to whom submitted in making a determination required to be made."

This court held that the District Court did not err in refusing the Appellant's requested instruction as any question of "materiality" would be for the Court, not the jury.

The Appellant further contended on appeal that the evidence with regard to Count 12 of the indictment was insufficient as a

matter of law to support the conviction. The Court of Appeals rejected this contention. The Appellant believes this Court erred.

ARGUMENT

POINT NO. 1

THE COURT ERRED IN HOLDING THAT IT WAS NOT ERROR ON THE PART OF THE DISTRICT COURT TO REJECT THE APPELLANT'S REQUESTED INSTRUCTION ON "MATERIALITY" OF THE FALSE STATEMENT.

It is the Appellant's contention that a false statement must relate to a material fact under Title 18, United States Code, Section 1014 and that in any event, the materiality of the statement is probative on the Appellant's intent to influence the bank and on the capacity of the statement to influence the bank. United States v. Kernodle, 376 F. Supp. 844 (D.C.N.C. 1973); United States v. Goberman, 458 F. 2d. 226 (3rd Cir. 1972).

This Court in rejecting the Appellant's contention stated that in any event any question of materiality would be for the Court, not the jury. This Court cited United States v. Bernard, 384 F. 2d.915,916 (2d. Cir. 1967); and United States v. Alu, 246 F. 2d 29,32 (2d Cir. 1957). Neither case is applicable. In the case of United States v. Bernard, supra, the District Court in its instruction to the jury stated that certain acts of the defendants

were in fact "material". However, in the case on appeal the District Court did not make a finding that the alleged false statement was in fact material nor did it so instruct the jury. The District Court instructed the jury that the false statements must have been made for the purpose of influencing the bank's action and defined the phrase "for the purpose of influencing" as meaning that the person making the false statements intended the bank to take action because of them. However, this instruction is insufficient as the District Court did not give the jury a standard by which to determine whether the Appellant intended a particular statement to influence the bank's action. "Materiality is the standard as the jury can infer that a false statement as to a material fact was intended to influence the bank's action. A false statement as to some immaterial fact cannot be assumed to have been made to influence the bank's action. For this reason the Appellant was prejudiced by the District Court's rejection of his requested instruction.

The case of United States v. Alu, Supra, is also available as that case deals with an indictment for perjury and in perjury indictments, the question of materiality is always for the Court not the jury to decide.

POINT NO. 2

THE VERDICT IS CONTRARY TO
THE WEIGHT OF THE EVIDENCE
AND IS NOT SUPPORTED BY
SUBSTANTIAL EVIDENCE.

With regard to Count 12 of the indictment, the government did not offer any evidence to prove that the Appellant knew of any of the information in the loan application or financial statement of Power's at the time it was submitted to the bank or that he knew that the application stated that the proceeds of the loan would be used to pay for a boat purchased by the borrower. Furthermore, this Court did not address itself to this issue raised in Appellant's brief.

POINT NO. 3

THERE WAS A FATAL VARIANCE
BETWEEN THE INDICTMENT AND
THE PROOF.

Count 10 of the indictment states the name of the borrower on the loan application or financial statement as Carmine Liberatore. The proof at trial showed a loan made to 8626 Realty Corp. There was no financial statement for the corporation. There was a financial statement of Carmine Liberatore but no application for a loan. No loan was made to Carmine Liberatore nor was there any evidence that a loan was applied for by Carmine Liberatore either with or

without his knowledge and approval.

This Court did not address itself to the variance between the indictment and the proof. One thing is certain and that is that Carmine Liberatore was not a borrower nor did he apply for a loan as alleged in Count 10 of the indictment. For this reason the Appellant's conviction on Count 10 should be reversed.

CONCLUSION

For the foregoing reasons, the Appellant's petition for a rehearing and determination en banc should be granted.

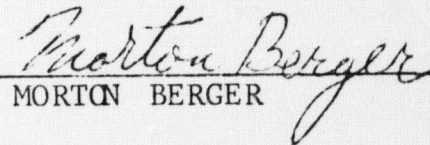
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the attached Petition for Rehearing and Determination en Banc has been furnished by mail this 10th day of November, 1977 to Richard Weinberg, Assistant United States Attorney, Department of Justice, Southern District of New York, One St. Andrew Plaza, New York, New York.


MORTON BERGER